

PATRICIA GEHRING
Claimant

ALVIN SCOBEE DBA AL'S EDGE OF TOWN
Respondent

FARMERS INSURANCE EXCHANGE
Insurance Carrier

[illegible]

Docket No. 1,010,787

Claimant requests review of the July 25, 2003 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes (ALJ).

Respondent and its carrier have requested review of the preliminary hearing Order which awarded temporary total disability benefits, the payment of past medical bills and medical treatment through Dr. Pat Do. Respondent contends the ALJ erred in finding claimant sustained an accidental injury arising out of and in the course of her employment with respondent.

Claimant maintains the Order should be affirmed as the evidence establishes an accidental injury occurred on May 29, 2002 and on each and every day thereafter until March 7, 2003, her last day of work for respondent.

Having reviewed the evidentiary record filed herein, the Board the following findings of fact and conclusions of law:

At the preliminary hearing claimant testified that on May 29, 2002 she was helping clear some tables in respondent's restaurant. As she was taking a load of dirty dishes to be cleaned, she made a left turn and felt something snap in her right foot. The pain manifested in the second and third toes on her right foot. She called Joanne Hill, the manager, at home, and reported the accident. Treatment was authorized and she was directed to Dr. Pat Do for an evaluation.

For a period of time claimant had some restrictions on the length of time she was to spend on her foot and was also directed to wear a special shoe. The respondent was able to accommodate these restrictions in claimant's normal job as hostess. Over the rest of 2002 her foot did not get better, although it appears from the record that claimant was eventually released to return to full duty before the end of 2002.

At the beginning of 2003 claimant continued to work but was still experiencing problems with her right foot. She sought treatment from Dr. Do and was then given a referral to an orthopaedic surgeon as well as significant restrictions on March 7, 2003. These restrictions limited claimant's time on her feet to three (3) hours per seven (7) hour shift. Respondent's owner and manager determined they could not accommodate this restriction and claimant was not permitted to continue working. She has not worked since that date and has been advised that she will need surgery.

The respondent then received some information that caused the insurer to question the compensability of the claim. Lorraine Ann Hutchens, a co-worker, testified that a few days before May 29, 2002, claimant told her she had injured her foot when she was moving and stepped off a sidewalk. Ms. Hutchens did not know which foot claimant claimed to have hurt in this incident. Larry Baker, an acquaintance of claimant's, testified that claimant told him she had injured her right foot in the "latter part of April, first of May, somewhere in there of last year." (Baker dep., p.5). It is worth noting that Mr. Baker's statement is predicated with the declaration that "[t]his would be a wild guess." (Id.)

After reviewing the testimony offered by the parties along with the medical records entered into evidence during the preliminary hearing, the Board finds the ALJ's Order should be affirmed. The compensability of this claim turns on credibility. The ALJ had the opportunity to evaluate the credibility of the claimant as well as all the witnesses, except for Mr. Baker. The ALJ concluded there was sufficient evidence to persuade her that claimant sustained a series of accidental injuries arising out of and in the course of her employment with respondent which culminated on March 7, 2003. There is nothing within the record that compels the Board to disturb that finding.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim. K.S.A. 44-534a(a)(2).

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that Nelsonna Potts Barnes' preliminary hearing Order dated July 25, 2003 should be and is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2003.

BOARD MEMBER

c: Brian Pistotnik, Attorney for Claimant
 Gary A. Winfrey, Attorney for Respondent
 Nelsonna Potts Barnes, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director